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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 180.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PENNSYLVANIA, PLAINTIFF IN ERROR,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, TO THE USE OF FRANCIS E. S. WOLFE, RECEIVER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 27, 1907.

(20,500.)

(20,500.)

SUPREME COURT OF THE UNITED STATES.

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In the Court of Appeals of the District of Columbia.

No. 1694.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver.

a Supreme Court of the District of Columbia.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver, Plaintiff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it Remembered, That in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration.*

Filed January 31, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver, Plaintiff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Defendant.

The plaintiff sues the defendant, a foreign corporation doing business in the District of Columbia and having an agent therein con-

ducting its business, for money payable by the defendant to the plaintiff, for that, whereas, the plaintiff and the defendant, being each engaged in the business of insuring property against loss and damage by fire, said defendant issued and delivered to plaintiff its open policy of reinsurance, on to wit: the 8th day of June, A. D. 1895, in the words and figures following, to wit:

"Reinsurance Compact.

The Allemannia Fire Insurance Company of Pittsburg, Pa., With the Firemen's Insurance Company of Baltimore, Maryland.

2 By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, hereby agrees to reinsure the Firemen's Insurance Company of Baltimore, Maryland, under its policies, renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided, by *The Allemannia Fire Insurance Company of Pittsburg, Pa. it Being Understood and Mutually Agreed* that each entry or certificate under this compact shall be made, issued and subject to and governed by the following terms, Conditions, and Stipulations:

Prohibitions, Lines and Limits.

1. Entries under this compact shall not be made to reinsure any portion of any contract covering risks prohibited in the list of *prohibited risks*, lines and limits furnished said Firemen's Insurance Company of Baltimore, Maryland, by this Company, and entries covering any risk or class of risks limited, shall not be binding for a sum in excess of the limits therein named, and entries shall not be binding for a sum exceeding the line or amount retained and carried by the said reinsured Company at its own risk, without other reinsurance, under its contracts covering property, in or on the same building or risk, in or on which the contracts so reinsured may cover, and in or *on others next adjacent thereto or connected therewith.*

3 2. It being further understood, that when by cancellations of contracts, at request of the assured, or reinsured or by transfer to cover in another location, or by expiration of contracts, whereby the said reinsured Company may be left with a line of amount pending at its own risk of less than the amount reinsued, or without any contract so pending excepting that which may be reinsured *such entries shall not be invalidated thereby.*

Ad-Interim Entries.

3. *Ad-interim* or covering entries under this compact may be made to reinsure and cover such excess lines or risks, not prohibited

and not to exceed the limits above referred to, as said reinsured Company may accept and insure or reinsure under its contracts.

4. Provided that on the day of such covering entry the said, Firemen's Insurance Company as aforesaid of said reinsured Company shall mail to the said Allemannia Fire Insurance Company at Pittsburg, Pa., an advice or covering report of the number, amount and date of such entry, and state therein the name of reinsured, location, kind or class or risk covered, and the amount it may then have pending thereon.

5. The intention herein being, that this Company shall protect the said reinsured Company, in the manner herein provided, upon such excess lines, from the date they are covered under the contracts of said reinsured Company, until full reports of the same, may by it, be received, and such entries being fully reported to this
4 Company as hereinafter provided, and in no event shall any *ad-interim* entry remain open or be binding *upon this Company for a longer period than fifteen days from the date thereof.*

Reinsurance Reports.

6. Each entry under this compact, and each cancellation, closing notice, endorsement or change that may refer to or change the ownership, location, or premium of the contract or risk hereunder reinsured, of which the said reinsured Company may have received notice at its office at, Baltimore, Maryland, shall be promptly reported to this Company upon blanks provided for that purpose, and each of such reports shall contain a copy of the contract hereunder reinsured, and of the endorsements or changes herein referred to, and the amount, rate, premium, term and expiration of such contracts, or of the reports of same made to said reinsured Company by the parties issuing or making the same.

7. Full and regular reports as above, shall also be made to replace each advice or covering report and complete each *ad-interim* entry that may have been made under this Compact, within five days after said reinsured Company shall have received at its office at Baltimore, Maryland, a full report of the contract reinsured *ad-interim,* and in no event shall such full and regular reports be delayed beyond a period of fifteen days from the date of such *ad-interim* entry, otherwise, the same shall be deemed to have been terminated or rendered void; and all of the reports above referred to shall be lodged
5 or filed with this Company and made a part of the entry to which they refer or pertain.

8. Each entry under this Compact shall be binding, commence, or take effect at 12 o'clock noon, of the day on which the reports herein referred to are mailed, addressed to the Allemannia Fire Insurance Company, at Pittsburg, Pa., and duly postmarked at the Post-office in the City of Baltimore, Maryland.

Cancellation of Entries.

9. This Company may decline any entry under this Compact, or cancel or terminate any entry by notifying the within named Fire-

men's Insurance Company, of said reinsured Company of its desire so to do, and refunding or tendering a pro-rata proportion of the reinsurance premium paid therefor, in which case the said reinsured Company shall be allowed ten days from the date of such notice within which to complete such cancellation, and the said reinsured Company may cancel and terminate any entry by allowing this Company the customary short rate proportion of the reinsurance premium thereon. It being understood that when any contract of said reinsured Company, hereunder reinsured, is cancelled at pro-rata rates, then this Company will refund at pro-rata proportion of the reinsurance premium received upon the entry reinsuring the same, also that a ratable proportion of any commission or other allowance made upon any reinsurance premium shall be deducted from the amount of unearned or returned premium, and the net balance only be returnable to said reinsured Company.

6 *Losses and Loss Expenses.*

10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder
7 reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof.

12. This Company shall reimburse the said reinsured Company for a ratable proportion of all actual expenses, legal and otherwise, incurred by said reinsured Company in adjusting, resisting or investigating any claim for loss under its contracts hereunder reinsured, or allowed by it therefor upon receiving a statement or account of said expenses.

Accounts and Allowances.

13. The said Officers of the said reinsured Company shall render to the said Allemannia Fire Insurance Company at Pittsburg, Pa. not later than the fifteenth day of each calendar month, a statement of all entries, or certificates of reinsurance made or issued under this Compact during the immediately preceding month, and shall accompany the same with an account current exhibiting the amount of reinsurance premiums as shown by said statement, and a remittance by check to order of said Allemannia Fire Insurance Company, to cover the amount of same, after deducting therefrom, the amount of cancelled or returned reinsurance premiums reported during the same month, and from the balance thus obtained 30% and 10% contingent per centum to cover commissions and all expenses excepting loss expenses.

Termination of Contract.

14. This compact of reinsurance may be discontinued and terminated by either Company herein named, upon its giving
8 thirty days' notice in writing to the other, and in the event of such discontinuance and termination of this Compact, all risks previously reinsured and accepted hereunder, shall remain in full force and effect until the expiration or cancellation of the original contracts, reinsured, unless otherwise mutually agreed.

Ad-Interim Renewals.

15. It is hereby understood and agreed that whenever contracts of the Firemen's Insurance Company, reinsured by any single policy, or by entries under this compact, or any policy of this Company, is continued beyond expiration or termination by said reinsured Company, either by a renewal, agreement, or a new policy, or entry upon the same risk for the same amount as the expired or terminated contract so reinsured, such single policies or entries under said Compact or policies shall be considered as continuing and binding, *ad-interim*, for a period of not exceeding twenty days from the date of their expiration, in the same proportion and manner as they originally applied to such reinsured contracts. Provided that said reinsured Company shall mail to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., as provided in said compact, a full report of the entry made to continue the reinsurance of such contracts as may be renewed or rewritten within five days after it shall receive notice of a renewal or continuation of such contracts, at its office at Pittsburg, Pa., and within twenty days after the expiration of said reinsurance policies or entries so continued, otherwise such *ad-interim* reassurances shall be void and of no effect.

9 *In Witness Whereof*, this Company has caused these presents to be signed by its President and Secretary, in the City of Pittsburg, State of Pennsylvania on this 8th day of June in the year eighteen hundred and ninety-five.

JOS. ABEL, *President.*

G. W. HAMMER, *Secretary.*"

And the plaintiff avers that it had severally insured against direct loss by fire, certain risks in certain amounts under certain policies issued by it, and the defendant, having been duly paid by the plaintiff the several premiums therefor, did in and by its said policy of reinsurance, reinsure said plaintiff a certain portion of said risks respectively; that the direct losses by fire under said risks so insured by plaintiff and reinsured as aforesaid by defendant, as finally ascertained, adjusted and determined, amount in the aggregate to the sum of, to wit: $56,312.56, for which the plaintiff was and is liable as aforesaid; and for the sum of, to wit: $22,613.24 of this amount said defendant is liable to the plaintiff under said contract of reinsurance by it as aforesaid, on said several risks so reinsured by it as aforesaid in full force and effect at the time of loss respectively.

And plaintiff further avers that it fully complied with all the terms of said contract of reinsurance on its part and did and performed all the acts and obligations which it was obligated to do and perform in order to entitle it to the performance of said contract on the part of the defendant, and to the payment by the defend-
10 ant to the plaintiff of the amount of loss as aforesaid under the said several risks so reinsured by it as aforesaid.

And plaintiff files herewith, as part hereof, and as though fully set forth herein, its particulars of demand, giving in detail the number of each policy issued by it, the party insured, the property insured, the amount insured, the number of each entry duly made and reported and giving all the information as and required by said contract of reinsurance, the amount of loss determined and adjusted under each policy and the respective amounts for which said defendant is liable to the plaintiff, under each entry of reinsurance aforesaid, of each and all of which said defendant was duly notified, informed and advised; but said defendant, notwithstanding its undertaking and promise as aforesaid and in violation thereof, although requested, has refused to pay its share of the losses aforesaid.

And the plaintiff further avers that by reason of the heavy losses sustained by it in the great conflagration in the City of Baltimore, State of Maryland, in the month of February, 1904, under its outstanding policies, and for which said losses it is liable, it became insolvent and unable to pay said losses and will be unable to pay the same unless it can collect the amount due it by the defendant as aforesaid and other corporate fire insurance companies with which it had contracts of reinsurance, and that by decree passed by the Circuit Court of Baltimore City on the 16th day of February, A. D. 1904, at the suit of Lloyd Wilkinson, Insurance Commissioner, *et al.*, in case No. A 3299, said Francis E. S. Wolfe was appointed
11 Receiver of the plaintiff and authorized to take possession of all its assets and to collect the outstanding debts due it.

And the plaintiff further sues the defendant for work and labor done by the plaintiff for the defendant at its request: for money paid by plaintiff for use of defendant at its request; and for money found due by the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims $22,613.24, with interest from May 1,

1904, until paid, according to the particulars of demand hereto annexed; and the costs of suit.

WM. F. MATTINGLY & SON,
Attorney- for Plaintiff.

Verdict was for int. from *May 4* '04. F. W. S.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

WM. F. MATTINGLY,
Attorney for Plaintiff.

12 **Allemannia Fire Insurance Company of Pittsburgh, Pa., to Firemen's Insurance Co. of Baltimore, to E. S. Wolfe, Receiver.**

For amount of Loss under the following entries of the Allemannia Fire Insurance Co., Reinsuring the following Policies of the Firemen's Insurance Company of Baltimore as per Claims filed:

Firemen's.		Am't loss.	Allemannia proportion.
#166668.	O. B. Zantzinger $1500 H. H. Furniture Pikesville Md.	$333.33	
	Allemannia entry #5499, Reinsures.	.....	$111.11
165546.	W. J. Dickey & Son, $10,000. Building 16 Light St. Balto. Md.	10,000.00	
	Allemannia entry #5234, Reinsures.	.....	5000.00
474452.	Caroline Rennert, $1500 Building 13-15 E. Fayette —, Balto. Md.	1,500.00	
	Allemannia entry #5465, Reinsures	.....	1500.00
165513.	Md. Nat'l Bank. $5000 Building—Hopkins Pl. & Lombard St. Balto. Md.	169.70	
	Allemannia entry #5256, Reinsures.	.....	42.42
163983.	L. & M. Kiefer, $5000 Building 407 E. Fayette St. Balto. Md.	4,161.00	
	Allemannia entry #4742, Reinsures.	.....	2080.50
156630.	Thos. Deford & Co. $4000 Building 40. 42 S. Calvert St. Balto. Md.	4,000.00	
	Allemannia entry #4856, Reinsures.	.....	2000.00
158179.	Builders' Exchange Co. $10000. Building—Charles & Lexington Sts. Balto., Md.	21.73	
	Allemannia entry #3218, Reinsures.	.....	10.86
150163.	E. F. Abell, $5000 Building 11 E. Lombard —, Balto. Md.	5,000.00	
	Allemannia entry #5295, Reinsures.	.....	1500.00
13			
165593.	E. R. West, $7000 Furniture &c. Fred'k Road Balto. Md.	87.00	
	Allemannia entry #5243, Reinsures.	.....	21.75
158125.	Nat'l Union Ins. Co $6000 Building—912 Penna. Ave. N. W. Washington, D. C	21.00	
	Allemannia entry #3198, Reinsures	.....	7.00
157688.	M. Restivo, $2000 Saloon & fur. Back River Balto. Co., Md.	1018.80	
	Allemannia entry #5184, Reinsures.	.....	339.60
163406.	Sperry Jones & Co., $30,000. Buildings S. E. cor. Fayette & Calvert & 7 N. Calvert St. Balto. Md. V — Cook Rec.	30000.00	
	Allemannia entries #4566 and 4571 Reinsures ($5000 each).	.....	10,000.00
			$22,613.24

Demurrer.

Filed February 27, 1905.

In the Supreme Court of the District of Columbia.

No. 47490. Law.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, to the Use, &c.,
vs.
ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURGH.

The defendant says that the declaration filed herein is bad in substance.

ANDREW Y. BRADLEY,
Attorney for Defendant.

14 NOTE.—One of the matters of law to be argued in support of this demurrer is that the declaration does not show a sufficient performance on the part of the plaintiff of the contract sued upon, as to entitle it to maintain this action.

Supreme Court of the District of Columbia.

Friday, June 2, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

At Law. No. 47490.

THE FIREMEN'S INS. CO. OF BALTIMORE, Pl'ff,
v.
THE ALLEMANNIA FIRE INS. CO. OF PITTSBURG, Def't.

Upon hearing the demurrer of the defendant to the declaration, it is considered that said demurrer be, and the same hereby is overruled; with leave to the defendant to plead within fifteen days, as it may be advised.

15 *Opinion.*

Filed June 2, 1905.

In the Supreme Court of the District of Columbia.

47490. Law.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, to the Use of FRANCIS E. F. WOLFE, Receiver, Plaintiff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, Defendant.

In this case a declaration is filed by the plaintiff against the defendant, based upon a contract of reinsurance of property insured by the plaintiff Company, and which was destroyed by the conflagration in Baltimore, in February, 1904.

A copy of the contract is set out in the declaration, wherein it is designated, "Reinsurance Compact." The plaintiff had originally insured the property which was destroyed, and after the adjustment its losses were calculated to be Fifty-six Thousand, Three Hundred and Twelve Dollars, and Fifty-six Cents, ($56,312.56) and the amount of reinsurance for which the defendant is sued, is Twenty-two Thousand, Six Hundred and Thirteen Dollars, and Twenty-four cents ($22,613.24).

There were twelve separate policies of the plaintiff Company, insuring as many separate risks. A certain proportion of each risk, as described in said policies, was assumed by the defendant under its reinsurance compact.

16 The declaration further avers that the plaintiff Company became insolvent by reason of the heavy losses sustained by it in the said conflagration; and that by decree of the Circuit Court of Baltimore City, said Receiver was appointed and authorized to take possession of all its assets and collect its outstanding debts.

The declaration also contains the common counts for work and labor done, and money paid, and for money found due.

The eleventh clause of the compact of reinsurance is as follows:

"Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks and valuation as may be assumed by the said reinsured Company under its *original* contracts hereunder *reinsured,* and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured after deducting therefrom any and all liability of other reinsurers of said contracts, or any part thereof."

To this declaration the defendant has filed a demurrer, and states that one of the matters of law to be argued in support of it is, that the declaration does not show a sufficient performance of said contract, on the part of the plaintiff to entitle it to maintain this action.

It does not appear from the declaration that the plaintiff has paid any part of the losses incurred under the policies described. The defendant claims that such payment is necessary before the
17 plaintiff can recover on the contract or reinsurance, and bases such claim upon the language of said paragraph eleven, which says, "losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts," &c.

It is claimed by counsel for the defendant that these words must be construed to mean that before liability attaches upon the part of the defendant, the plaintiff must have actually paid the amount which it contracted to pay upon the said several policies of insurance; and such being a condition precedent, that the words, "in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid," &c., preclude the idea that the insolvency of the plaintiff will excuse such actual payment in order to fasten liability upon the company.

What is a condition precedent? The authorities define it as follows:

"A condtion which calls for the performance of some act, or the "happening of some event, after the terms of the contract have been "agreed upon, before the contract shall take effect." (8 Cyc., 558.)

Again, A "condition which must be performed before the agree-"ment of the parties becomes a valid and binding contract." (7 Am. & Eng. Enc. (2nd Ed.) 118.)

18 Again it is said that where a condition precedent exists, the contract may be made in due form, but it does not become operative as a contract until the condition specified is performed.

In the usual contract of reinsurance, the reinsuring company agrees with the reinsured company to share the responsibility of the risk of loss by fire, which the reinsured company has become bound to pay by its contract with the owner of the property. This contract of reinsurance is made for a consideration which is paid when the contract is entered into, and it becomes a valid contract from its date. If no fire occurs, nothing will ever be paid by the reinsuring company. If a fire occurs, and the company making the original contract of insurance adjusts the loss, then to the extent of such loss, or the proportionate part thereof assumed by the reinsuring company, the company writing the first policy has its right of action, and the reinsuring company will be obliged to pay.

It is the contracts of insurance that are re-insured by the express language of the compact.

Counsel for the defendant admit that the general rule is that the

insolvency of the reinsured company will not excuse the reinsuring company from paying its obligations; but his argument is that in the present case, the special words contained in paragraph eleven, must necessarily mean that no obligation arises until after actual payment is made by the plaintiff.

A number of authorities have been cited, which hold that the words in said paragraph which provide for the payment of the pro-
rata part, "in the same manner and upon the same terms
19 "and conditions as paid by the said reinsured company," &c.
do not require that the reinsured company should first have paid the losses under its original contract.

It is a cardinal principle of the law of reinsurance that the reinsurer is not liable on his contract for more than the amount of the original insurance; and where the contract of reinsurance is for a certain proportion of the original insurance, these words are construed to apply, not to the question of liability, but only to the amount which is to be paid; and no other construction seems to give force and effect to the whole contract; so that if these were the only words in this contract by whch the defendant would claim to be excused from payment by reason of the insolvency of the plaintiff, and its failure to have paid its own obligations, the construction contended for by defendant's counsel would have to be considered against the clear weight of authority, and the demurrer would have to be overruled.

Counsel insists, however, that the words, "and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured, or reinsured by the said reinsured company, under its original contracts," &c., mean, and must necessarily be construed and held to mean, that before liability attaches, the loss by fire must have been incurred, and actually paid; and such it seems to me must be the logic of the case, if actual payment is a condition precedent.

The fallacy of such a construction, however, will appear
20 by the very statement of it. If no liability is to be incurred
by the defendant by virtue of its contract, until after a fire has occurred, and the loss has been paid by the plaintiff, what consideration will the plaintiff receive for its premiums paid to the defendant? And what inducement will there be for a contract of reinsurance. In all cases where no fires occur during the life of the first policies, the company writing them would then be paying for contracts of reinsurance, that never took effect.

If we read the last words of the clause, number eleven, we see at once what the parties referred to, by the use of these limiting words, namely, a method of determining the actual amount of the defendant's liability under its said contract, and not the time when the liability should first attach, because these words, if applied to the question of amount only, are given ample meaning, and such as will be in consonance with all the other words of the contract.

They were intended to mean, and do mean, as I think, when read in connection with the whole contract, that in no event should the defendant be required to pay on its contract more than its ratable proportion of the actual liability of the plaintiff, "after deducting

therefrom any and all liability of other reinsurers of said contracts, or any part thereof." That means simply this, that if the plaintiff's original contract was for Three Thousand Dollars, ($3,000.) and it had reinsured One Thousand Dollars ($1,000.) with the defendant, and One Thousand Dollars, ($1,000.) with another company, and afterwards a fire had occurred, and the loss had
21 been adjusted and determined to be One Thousand, Five Hundred Dollars, ($1,500.) the defendant could be held liable to pay only Five Hundred Dollars ($500.) of that loss.

Of course it is contemplated in the making of a contract, such as is described in this declaration, that payment is to be made by the company reinsured, and the use of the words, "actually paid," may readily be attributed to that fact; and when the contract was prepared, the possibility of insolvency of the plaintiff may not have been considered; but as the contract must be given a rational meaning, if possible, and as it must be construed most strictly against the defendant, the party making the same, I think it must be held that these words only apply to the amount for which the plaintiff is to be actually liable to pay, after making the deductions named; and that the amount of such obligations or liability, is what the defendant intended to indemnify him against by its contract of reinsurance.

The defendant received a consideration, based upon the tables, supposed from experience to be profitable for the party making such a contract of indemnity, and fair to the party reinsured; and I think it was never intended that before any liability whatever, attached, the fire should have destroyed the property insured, and the loss should have been actually paid by the plaintiff. I think the reinsurance contract is an available asset of the insolvent company which has providently invested its money in such contract. I will therefore overrule the demurrer to this declaration, with leave to the defendant to plead thereto within ten days.

JOB BARNARD, *Justice.*

22 *Pleas.*

Filed June 26, 1905.

In the Supreme Court of the District of Columbia.

No. 47490. At Law.

THE FIREMEN'S INSURANCE COMPANY
vs.
THE ALLEMANNIA FIRE INSURANCE COMPANY.

The defendant for plea to the declaration filed herein, says that it did not undertake and promise in manner and form as in said declaration alleged.

2. And for a further plea, the defendant says that the plaintiff is not liable to Vernon Cook, receiver of Sperry Jones and Company, as set out in the particulars of demand annexed to the declaration filed herein.

ANDREW Y. BRADLEY,
Attorney for Defendant.

Joinder in Issue.

Filed June 27, 1905.

In the Supreme Court of the District of Columbia, the 27th Day of June, 1905.

No. 47490. At Law.

Between—

THE FIREMEN'S INS. CO., Plaintiff,
and
THE ALLEMANNIA FIRE INS. CO., Defendant.

23 The Plaintiff joins issue upon the defendant's pleas.

WM. F. MATTINGLY,
Attorney for Plaintiff.

Memorandum.

April 25, 1906.—Verdict for plaintiff for Twelve thousand six hundred and thirteen dollars and twenty-four cents ($12,613.24) with interest from May 4, 1904.

Supreme Court of the District of Columbia.

WEDNESDAY, *May* 2, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver, Pl't'ff,
vs.
THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Def't.

The time within which to move for a new trial having expired, judgment on verdict is ordered.

24 Therefore it is considered that the plaintiff recover against the defendant the sum of Twelve thousand, six hundred and thirteen 24/100 ($12,613.24), with interest thereon at the rate of six (6) per cent. per annum from the 4th day of May, 1904 until paid, being the money payable by it to the plaintiff, by reason of the premises, together with its costs of suit to be taxed by the Clerk, and have execution thereof.

Supreme Court of the District of Columbia.

FRIDAY, *May* 11, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver, Pl't'f.

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Def't.

Now comes here as well the plaintiff by its Attorney Mr. William F. Mattingly, as the defendant by its Attorney Mr. Andrew Y. Bradley; whereupon the Attorney for the defendant in open court notes an appeal to the Court of Appeals, and moves the Court to fix the amount of bond on said appeal, which motion is granted, and the penalty of the bond to operate as a supersedeas is
25 fixed at twenty thousand dollars ($20,000).

Memorandum.

May 21, 1906.—Appeal Bond Filed.

Supreme Court of the District of Columbia.

WEDNESDAY, *June* 13, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY, Pl't'f,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY, Def't.

Now comes the defendant by its Attorneys and pray- the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause, now for then, which is accordingly done.

26 *Bill of Exceptions.*

Filed June 13, 1906.

In the Supreme Court of the District of Columbia.

No. 47490. At Law.

THE FIREMEN'S INSURANCE COMPANY
vs.
THE ALLEMANNIA FIRE INSURANCE COMPANY.

Be it remembered that the above entitled cause came on to be tried before Mr. Justice Wright and a jury, on the 25th day of April A. D. 1906; Messrs. William F. Mattingly & Son and T. Wallis Blackistone appearing on behalf of the plaintiff, and Messrs. Andrew Y. Bradley and Charles H. Bradley on behalf of the defendant.

And thereupon the plaintiff, to maintain the issues on its part joined, introduced in evidence the insurance compact herein sued upon, the only section of which in regard to the construction of which there is any question raised by the pleadings and record herein, is as follows:

11. Each entry under this compact, unless otherwise provided in this compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company under its contracts hereinunder reinsured, and in no event
27 shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts, or of any part thereof."

And thereupon the plaintiff introduced further evidence sufficient to entitle it, upon the questions of fact, to a verdict for the sum of $12,613.24 with interest from May 4th, 1904. The plaintiff also introduced evidence by which it established the fact that it had become insolvent by reason of the losses sustained by it incident to the Baltimore fire of 1904, and that a receiver had been appointed for it by the courts of Maryland, and that said receiver had paid to its creditors after this suit was brought, three dividends, namely, one of thirty, one of thirteen, and one of twelve per cent., aggregating fifty-five per cent.

And thereupon the plaintiff rested.

And thereupon the defendant, by its counsel, moved the Court to instruct the jury to return a verdict for the defendant, upon the ground that there was a variance between the allegations of the declaration and the evidence in regard to the insolvency of the plaintiff.

And thereupon the Court overruled the said motion of the defend-

ant, to which said action the said defendant, The Allemannia Fire Insurance Company, by its counsel, then and there duly excepted, which said exception was duly allowed.

28 And thereupon the defendant, by its counsel, without offering any evidence, prayed the Court to instruct the jury as follows:—

"No. 2. The jury are instructed that proof of mere liability on the part of the plaintiff under the original contracts or policies, involved in this suit, is not sufficient to entitle it to a verdict against the defendant; and the jury are therefore further instructed, that they must return a verdict in favor of the defendant, unless they shall find from the evidence that the plaintiff has actually paid the whole or some part of one or more of the claims against it enumerated in the schedule annexed to the contract of reinsurance here sued upon."

"No. 3. The jury are instructed that if they find for the plaintiff, their verdict must not be for an amount in excess of a ratable proportion of the various sums actually paid by it to its policy holders under the original contracts or policies enumerated in the schedule attached to the declaration filed herein."

Which instructions were rejected by the court, and to the refusal of the court to grant the same the defendant then and there duly excepted, and the said exceptions were thereupon noted on the minutes of the court and duly allowed.

And thereupon the jury, under the instruction of the court, returned a verdict in favor of the plaintiff for the sum of $12,613.24 with interest from May 4th, 1904.

29 All the foregoing exceptions were duly and separately taken before the jury was instructed to return its verdict as aforesaid, and were duly noted by the court on its minutes at the time the same were severally taken, and were severally allowed by the court, and reference is hereby made to the same as though they were now severally and separately stated, and at the request of counsel for the defendant this bill of exceptions is signed and sealed, and made a part of the record in this case, now for then.

Witness my hand and seal this 13 day of June, A. D. 1906.

DAN THEW WRIGHT, *Justice.* [SEAL.]

O. K.
W. F. MATTINGLY,
Pl'ff's Att'y.

June 13, 1906.

Order for Preparation of Record.

Filed June 13, 1906.

In the Supreme Court of the District of Columbia.

The 13th day of June, 1906.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY
vs.
THE ALLEMANNIA FIRE INSURANCE COMPANY.

The Clerk of said Court will please prepare a transcript of record in the above-entitled cause and include therein the following:—

30 Declaration,
Demurrer,
Order overruling demurrer,
Opinion of the Court,
Pleas,
Joinder of Issue,
Verdict and Judgment,
Memorandum of Appeal and Appeal Bond,
Bill of Exceptions.

CHARLES H. BRADLEY,
ANDREW Y. BRADLEY,
Attorneys for Defendant.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47,490 At Law, wherein The Firemen's Insurance Company of Baltimore, &c., is Plaintiff, and The Allemannia Fire Insurance Company of Pittsburg &c., is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington in said District, this 22" day of June, A. D., 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1694. The Allemannia Fire Insurance Company of Pittsburg, State of Pennsylvania, a body corporate, appellant, *vs.* The Firemen's Insurance Company of Baltimore, a Body Corporate Under the Laws of the State of Maryland, to the Use of Francis E. S. Wolfe, receiver. Court of Appeals, District of Columbia. Filed Jun. 30, 1906. Henry W. Hodges, clerk.

TUESDAY, *October* 16*th*, *A. D.* 1906.

No. 1694.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate under the Laws of the State of Maryland, to the use of FRANCIS E. S. WOLFE, Receiver.

The argument in the above entitled cause was commenced by Mr. Andrew Y. Bradley, attorney for the appellant.

WEDNESDAY, *October* 17*th*, *A. D.* 1906.

No. 1694.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate under the Laws of the State of Maryland, to the use of FRANCIS E. S. WOLFE, Receiver.

The argument in the above entitled cause was continued by Mr. Andrew Y. Bradley, attorney for the appellant, and by Messrs. T. W. Blackistone and W. F. Mattingly, attorneys for the appellee, and was concluded by Mr. Andrew Y. Bradley, attorney for the appellant.

No. 1694.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate under the Laws of the State of Maryland, to the use of FRANCIS E. S. WOLFE, Receiver.

Opinion.

Mr. Justice MCCOMAS delivered the opinion of the Court:

In the court below the Firemen's Insurance Company of Baltimore, Md., to the use of Francis E. S. Wolfe, receiver, the appellee, sued the Allemannia Fire Insurance Company of Pittsburg, Pennsylvania, the appellant upon the appellant's contract of reinsurance of property insured by the appellee, which property was consumed by the great fire in Baltimore in February, 1904.

The declaration states that the amount of losses on the property reinsured was $56,312.56, and that the appellant was liable to

pay to the appellee $22,613.24 under its contract of reinsurance. The appellant demurred to the declaration. The demurrer was overruled, and upon the trial, the appellee recovered a verdict of $12,613.24. The disastrous Baltimore fire had rendered the appellee insolvent and the receiver instituted this action. At that time, the appellee had paid nothing, but prior to the trial it had paid fifty-five per cent. of its losses under the original contracts reinsured by the appellant.

The appellant raised but one question, by the demurrer overruled, and later by the instructions which were asked at the trial and refused.

The appellant demurred to the declaration on the ground that under the eleventh stipulation of the contract of reinsurance, the appellant was only liable for its *pro rata* share of the amount actually paid by the appellee to the insured, and because the declaration averred that the plaintiff below by reason of its heavy losses caused by the great conflagration in Baltimore in February, 1904, had become insolvent and had been placed in the hands of a receiver and was and will be unable to pay its losses unless it can collect the amount due by the defendant below and by other fire insurance companies with which it had contracts of reinsurance, and since it did not appear from the declaration that the plaintiff below had paid anything, it was not entitled to recover anything upon its contract of reinsurance by the defendant below.

The only question upon this appeal is the construction of the contract of reinsurance and especially the construction of the eleventh stipulation of that contract which is as follows: "Each entry under this compact, unless otherwise provided in this compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company under its contracts hereunder reinsured, and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

We must determine upon the demurrer whether the appellee having become insolvent, such insolvency, under the provisions of the eleventh stipulation, relieved the appellant from all liability under its contract of reinsurance.

The appellant insisted that by the terms of the stipulation just quoted actual payment by the appellee of its losses in whole or part was a condition precedent to its right of recovery from the appellant. It was conceded that by the weight of authority payment by the reinsured of its losses is not a condition precedent to its right of recovery against the reinsurer and also that the insolvency of the reinsured does not relieve the reinsurer from its liability. It was urged, however, that in none of the cases supporting the

proposition conceded did any of the contracts sued upon contain the additional provision which is here found, namely, "and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid, etc.," and this appears to be true.

The contract of reinsurance was early adopted by the maritime nations of continental Europe. Chief Justice Kent remarked that very little information upon this question can be found in the English books, as reassurances are rendered unlawful in most cases by the statute of 19 Geo. II, c. 37, and that by the law of the commercial nations of the continent the reinsurer was obliged to pay all that the first insurer ought himself to pay. "The reinsurer has no connection or concern with the first insurance, and is at all times bound to indemnify his own insured when the other can show that he has been damnified in consequence of the first insurance," and Livingston, J., added, "this engagement is to make good all that the first underwriter shall lose or become liable to pay." Hastie *v.* De Peyster, 3 Caines Rep., 194, 195.

In a later case it was said, in speaking of the reinsured, "their claim upon the reassurers rests upon their liability to pay the loss to the assured, not on their greater or less ability to pay it in full. If the liability of the reassurer depends upon the insolvency or bankruptcy of the first insurer, in many cases he will not become chargeable at all, or but to a nominal amount, according to the extent of the first insurer's insolvency." Hone *v.* Ins. Co., 1 Sandford, 152. Affirmed by the Court of Appeals in 2 N. Y., 235; N. Y. S. M. Ins. Co. *v.* Protection Ins. Co., 1 Story's Rep. 461.

The courts treat reinsurance as a contract of indemnity to the reinsured, wherefore it is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer, nor is the liability of the latter affected by its inability to fulfill its own contract with the original insured. The liability of the reinsurer unless specially limited by agreement is coextensive with that of the reinsured. In seeking the intent of the parties to the contract and construing its terms, the courts are always mindful that the policy is a contract of indemnity. In the case of a policy containing the following clause: "Loss, if any, payable *pro rata* and at the same time with the reinsured," it was held that by the first part of this clause, the defendant was not bound to pay the full amount reinsured by its policy, but only such a proportionate amount of the loss as is in the ratio of the amount of the reinsurance to the amount originally insured. In regard to the latter part of this clause which says the loss is payable "at the same time with the reinsured," it is not meant that actual payment by the reinsured is in fact to precede or to accompany payment by the reinsurer. "It looks to the time of payability and not to the fact of payment." See Blackstone *v.* Allemannia Fire Ins. Co., 56 N. Y., 107. In another case the contract stipulated that: "The losses, if any, are to be payable *pro rata* to the Enterprise Insurance Company at such time and in such manner as the latter company may pay," and Judge Sharwood said a contract of reinsurance is a contract of indemnity and this clause

must have such an interpretation as will not entirely defeat the contract. The Enterprise Company, being insolvent, had made a general assignment, and this learned judge remarked: "If the assignee can only recover from the defendant when and as he pays dividends on the assigned estate to the original insured, it is plain an endless number of suits must be the consequence; and if it had so happened that there was no assigned estate, there could be no recovery at all. I would construe the words 'as the latter company may pay' to mean 'as the latter company may be liable to pay.'" Affirmed. Fame Ins. Co.'s Appeal, 83 Pa., 396.

In *Ex parte* Norwood, 3 Bissell, 512, 18 Fed. Cas., 457, where the liability clause in the reinsurance contract was, "loss, if any, payable at the same time and *pro rata* with the insured," Blodgett, J., considered that the true meaning of the clause and a salutary one, is that the reinsuring company stipulates that it shall not pay any more loss than the original company is liable for; that the reinsuring company is to have the benefit of deductions by reason of other insurance or salvage, which the original insuring company would have, and also the benefit of any time or delay for examination which the first company might claim; that it is not to pay any faster than the original company, and is to have the benefit of any defense the original company would have had. So that the liability of the reinsuring company shall be coextensive only with the liability, and not with the ability to pay, of the original company. Judge Blodgett said: "It is to my mind absurd to say if a loss occurs, on one of those reinsured policies, that the company primarily liable is to have its claim against the reinsuring company limited by its ability to meet its obligations to its original holders. The very object of making the policy of reinsurance, was to place the company in funds with which to make its policy-holders whole, and that is defeated if the construction which is insisted upon by the assignee in this case is the true one."

In Cashau *v.* Northwestern Ins. Co., 5 Biss., 476, 5 Fed. Cas., 271, the court took the same view of a similar clause saying that under such a contract of indemnity the insolvency of the original insurer is no defense to a suit against the reinsurer, for the court said: "Otherwise, the defendant's policy would not be the contract of indemnity intended and endless litigation might ensue."

The parties to this contract are in different States. The place where the final act is performed which is necessary to establish the relation of reinsurer and reinsured becomes therefore the *locus* of the contract. Its terms make plain that the *locus* of the contract we are here considering was Maryland. In that State it is true the statute of 19 Geo. II, c. 37, is still in force as to reinsurance on marine risks, but the Court of Appeals construes in a fair and liberal spirit the contract of reinsurance against fire. In Ins. Co. *v.* Chashow, 41 Md., 74, etc., that court said that from the nature of the contract of reinsurance, the insolvency of the original insurer in no wise affects or limits responsibility under it, and in construing a clause almost identical in terms with the clause in the New York case last herein mentioned, adopts the reasoning of the New York

Court of Appeals and adds: "When we consider the distinct and independent nature of this contract and that it is wholly unaffected by the insolvency of the original insurer, there is, we think, no escape from the force of that reasoning."

Mindful of the construction uniformly given, as we have shown, to such contracts of reinsurance and of the construction which the Maryland court has given to a contract of indemnity such as we are here considering, we can not interpret this Maryland contract to mean that the reinsurance of its policies by the appellee, which, by the import of the contract of reinsurance itself, was designed by the original insurer to protect its policy-holders from its own inability to pay, was intended to defeat both if it happened to become insolvent.

In our opinion the additional clause in the eleventh stipulation of the contract of reinsurance before us was not intended to mean that the insolvency of the first insurer should release the reinsurer. The word "paid" in the clause "losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as *paid* by the said reinsured company" means "payable" or "liability to pay." The concluding words, "and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum *actually paid* to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured after deducting therefrom any and all liability of other reinsurers of said contracts, or any part thereof," does not vary the meaning so as to operate to release from liability the reinsuring company because the first insurer became insolvent. The added words were not intended to change and do not change the import of this contract of indemnity. They mean that the liability of the reinsurer is to be coextensive with the liability of the reinsured company and are intended to protect the reinsuring company from paying more than the "sum actually payable" by the reinsured company. The words "sum actually paid" in this collocation providing for deducting therefrom "all liability of other insurers" must mean that in no event shall the reinsuring company pay more than a ratable proportion of the sum "actually payable" by the reinsured company, or, in other words, more than its ratable proportion of the actual liability to pay "on the part of the reinsured after deducting all liability of other reinsurers." The construction urged so earnestly by the counsel for the appellant would defeat this contract of indemnity. The construction we give to this stipulation as to the liability of the appellant gives effect to the contract and is the only interpretation which preserves the vitality of the contract of reinsurance. It is the nature of the contract of reinsurance that the insolvency of the original insurer can in no wise affect or limit responsibility under it.

The judgment of the learned court below must be affirmed with costs, and it is so ordered.

Affirmed.

TUESDAY, *November 20th*, A. D. 1906.

No. 1694, October Term 1906.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate under the Laws of the State of Maryland, to the use of FRANCIS E. S. WOLFE, Receiver.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MCCOMAS.

November 20, 1906.

TUESDAY, *December 4th*, A. D. 1906.

No. 1694.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate under the Laws of the State of Maryland, to the use of FRANCIS E. S. WOLFE, Receiver.

On motion of Mr. Andrew Y. Bradley, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of twenty thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The Allemannia Fire Insurance Company of Pittsburg, State of Pennsylvania, a body corporate, Appellant, and The Firemen's Insurance Company of Baltimore, a body corporate, under the laws of the State of Maryland, to the use of Francis E. S. Wolfe, Receiver, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by its complaint

appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of December, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

Bond on Writ of Error.

Know all Men by these Presents, That we, The Allemannia Fire Insurance Company of Pittsburg, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto The Firemen's Insurance Company of Baltimore in the full and just sum of Twenty Thousand ($20,000) Dollars to be paid to the said The Firemen's Insurance Company of Baltimore its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this Seventh day of December, in the year of our Lord one thousand nine hundred and Six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said The Allemannia Fire Insurance Company of Pittsburg and the said The Firemen's Insurance Company of Baltimore a judgment was rendered against the said The Allemannia Fire Insurance Company of Pittsburg and the said The Allemannia Fire Insurance Company of Pittsburg having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Firemen's Insurance Company of Baltimore citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said The Allemannia Fire Insurance Company of Pittsburg shall prosecute said writ of error to effect, and answer all damages and

costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Allemannia Fire Insurance Company, Pittsburg, Pa.]

THE ALLEMANNIA FIRE INS. CO., [SEAL.]
By W. STEINMEYER, *Pres't.* [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK. [SEAL.]
F. M. HAYES, *Resident Vice President.* [SEAL.]

Attest: BRUCE MILLARD,
Resident Assistant Secretary. [SEAL.]

[Seal of American Surety Company, New York.]

Sealed and delivered in the presence of—
C. P. KELLERMAN, *Sec'y.*
W. J. JOHNSON,
As to Principal.
JNO. L. WALLACE,
As to Surety.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

C. K.—W. F. M.

[Endorsed:] 1694. The Allemannia Fire Insurance Company of Pittsburg, State of Pennsylvania, a body corporate, appellant, *vs.* The Firemen's Insurance Company of Baltimore, a body corporate, under the laws of the State of Maryland, to the use of Francis E. S. Wolfe, Receiver. Supersedeas Bond on Writ of Error to Supreme Court U. S. Court of Appeals District of Columbia. Filed Dec. 12, 1906. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To The Firemen's Insurance Company of Baltimore, a body corporate under the laws of the State of Maryland, to the use of Francis E. S. Wolfe, Receiver, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The Allemania Fire Insurance Company of Pittsburg, St te of Pennsylvania, a body corporate, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of December, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 12 day of December, A. D. 1906.

WM. F. MATTINGLY,
Att'y for Def't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 12, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 25 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Allemannia Fire Insurance Company, of Pittsburg, State of Pennsylvania, a body corporate, Appellant, *vs.* The Firemen's Insurance Company of Baltimore, a body corporate under the laws of the State of Maryland, to the use of Francis E. S. Wolfe, Receiver, No. 1694, October Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of December, A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,500. District of Columbia, Court of Appeals. Term No. 180. The Allemannia Fire Insurance Company of Pittsburg, Pennsylvania, plaintiff in error, *vs.* The Firemen's Insurance Company of Baltimore, to the use of Francis E. S. Wolfe, receiver. Filed December 27th, 1906. File No. 20,500.

Office Supreme Court, U. S.
FILED.
MAR 11 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 180.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PENNSYLVANIA, PLAINTIFF IN ERROR,

vs.

THE FIREMAN'S INSURANCE COMPANY OF BALTIMORE, TO THE USE OF FRANCIS E. S. WOLFE, RECEIVER.

ARGUMENT AND BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

ANDREW Y. BRADLEY,
CHARLES H. BRADLEY,
Attorneys for Plaintiff in Error.

H. PRESCOTT GATLEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 180.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PENNSYLVANIA, Plaintiff in Error,

vs.

THE FIREMAN'S INSURANCE COMPANY OF BALTIMORE, to the Use of FRANCIS E. S. WOLFE, Receiver.

ARGUMENT AND BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Statement of Facts.

The Fireman's Insurance Company of Baltimore, hereinafter referred to as the Reinsured, filed its declaration in the Supreme Court of the District of Columbia, to the use of Francis E. S. Wolfe, receiver, against The Allemannia Fire Insurance Company of Pittsburg, Pennsylvania, hereinafter referred to as the Reinsuring Company, upon a certain policy of insurance entered into between them on the 8th of June, 1895, which policy is set out at length in the declaration (R., pp. 2, 3, 4, and 5).

The declaration alleged the insurance by it of certain risks covered by the policy of reinsurance; losses under such risks so insured and reinsured, amounting in the ag-

gregate to $56,312.56, for which it was and is liable, and that of this amount the Reinsuring Company was liable to the Reinsured under the contract of reinsurance to the extent of $22,613.24.

It further alleged that by reason of its heavy losses consequent upon the great conflagration visited upon the City of Baltimore in February, 1904, it became insolvent and unable to pay said losses and will be unable to pay them unless it can collect the amount due it by this and other reinsuring companies with which it had contracts of reinsurance.

That by decree of the Circuit Court of Baltimore City, passed on the 16th day of February, 1904, Francis E. S. Wolfe was appointed receiver of said Reinsured and authorized to take possession of all the assets and to collect the outstanding debts due it.

Accompanying the declaration was a bill of particulars setting forth the various policies of insurance issued by said Reinsured and covered by the policy of reinsurance sued upon, the amount of losses thereunder, and the proportion of such losses claimed to be due from said Reinsuring Company (R., p. 7).

To this declaration a demurrer was interposed, in the margin of which it was noted that among the matters of law intended to be argued in support thereof was "that the declaration does not show a sufficient performance on the part of the plaintiff of the contract sued upon as to entitle it to maintain this action" (R., p. 8).

The court overruled the demurrer granting leave to plead (R., p. 8).

Thereupon two pleas to the declaration were interposed, one, the general issue, and the other specifically denying liability to Vernon Cook, receiver of Sperry, Jones & Company as set out in the bill of particulars (R., p. 12), which claim amounted to $10,000 (R., p. 7).

Issue was joined and a trial had, resulting in a verdict and judgment in favor of said Reinsured for the sum of

$12,613.24 (R., p. 13), being the amount claimed in the declaration less the amount claimed to be due said Cook, receiver of said Sperry, Jones & Company.

At the trial of the case Reinsured offered in evidence the contract of reinsurance sued upon, as well as evidence showing its insolvency due to losses incurred by the Baltimore fire of 1904, the appointment of a receiver for it, who, after the institution of this suit, "had paid to its creditors three dividends, viz., one of thirty, one of thirteen, and one of twelve per cent, aggregating fifty-five per cent;" and thereupon it rested (R., p. 15).

Whereupon, without offering any evidence, the Reinsuring Company asked the court to grant the following instructions:

> "No. 2. The jury are instructed that proof of mere liability on the part of the plaintiff under the original contracts or policies, involved in this suit, is not sufficient to entitle it to a verdict against the defendant; and the jury are therefore further instructed, that they must return a verdict in favor of the defendant, unless they shall find from the evidence that the plaintiff has actually paid the whole or some part of one or more of the claims against it enumerated in the schedule annexed to the contract of reinsurance here sued upon.
>
> "No. 3. The jury are instructed that if they find for the plaintiff, their verdict must not be for an amount in excess of a ratable proportion of the various sums actually paid by it to its policy-holders under the original contracts or policies enumerated in the schedule attached to the declaration filed herein."

The court refused to grant said instructions; to which ruling exception was duly noted (R., p. 16).

Assignment of Errors.

The court below erred:

1. In affirming the judgment of the trial court overruling the demurrer to the declaration.

2. In holding that the Reinsuring Company was liable to the Reinsured for its losses in the absence of payment of such losses.

3. In holding that the insolvency of the Reinsured did not relieve the Reinsuring Company from payment under its contract of reinsurance.

ARGUMENT.

Under the contract of reinsurance sued upon the Reinsured must have paid the losses on risks carried by it before it can recover from the Reinsuring Company.

All of the assignments of error present practically the same questions of law, and for that reason they will be discussed together.

The determination of this case depends upon the construction of two sections of the contract of reinsurance sued upon. These sections are as follows:

> "10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said Reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa., of the same, and of the date and probable amount of loss or damage, and after said Reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia

Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this company, upon blanks furnished for that purpose, by said Fireman's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, *and a copy of the original receipt taken upon the payment of such loss;* and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

"11. Each entry under this compact, unless otherwise provided in this compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said Reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro rata with, in the same manner, and upon the same terms and conditions as *paid* by the said Reinsured Company under its contracts hereunder reinsured, and in *no event* shall this company be liable for an amount in excess of a ratable proportion of the sum *actually paid* to the assured or reinsured by the said Reinsured Company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

It is conceded that the weight of authority is to the effect that, in the absence of some limitation or provision to the contrary, payment by the reinsured of its loss is not a condition precedent to the right of recovery against the reinsurer. It is also conceded that the insolvency of the reinsured does not relieve the reinsurer, unless that event be contemplated by or embraced in the contract of reinsurance.

Prior to the decision of the case of Hone *vs.* Mutual Safety Insurance Company, 1 Sandf., 137, which was *decided in the year 1847,* a contract of reinsurance did not differ materially in form from the ordinary policy of insurance, except that the prefix *"re"* was used in connection with the word "insurance." There was no provision in the contract for a *pro rata* settlement with the reinsured. The agreement of the reinsurer was "to make good to the reinsured all loss and damage, not exceeding" a certain amount, "as shall happen

by fire to the property described." In the case above referred to the court held that testimony tending to prove a custom among insurers of prorating losses was inadmissible as tending to vary the terms of an express agreement, and a judgment for the whole amount of the reinsurance was sustained, notwithstanding the fact that the reinsured was insolvent.

Subsequent to that decision it appears to have become the custom to incorporate in contracts of reinsurance a clause providing for a *pro rata* settlement of losses, together with various clauses by which it was attempted to provide against payment in full by the reinsurer in the event of the insolvency of the reinsured.

Twenty-five years subsequent to the decision of the case of Hone *vs.* Mutual Safety Insurance Company the case of Blackstone *vs.* Alemannia Fire Insurance Company was decided by the same court (56 N. Y., 104). The contract of reinsurance involved in that case contained the following clause: "Loss, if any, payable *pro rata* and at the same time with the reinsured."

The court, in construing that clause, said:

> "By virtue of the first part of this clause the defendant is not bound to pay the full amount reinsured by its policy, but only such a proportion of the amount of the loss as is in the ratio of the amount of the reinsurance to the amount originally insured."

The court held, however, that the words "at the same time with the reinsured" did not relieve the reinsurer, although the reinsured had become insolvent and could not pay.

In Consolidated R. E. & F. Ins. Co. *vs.* Cashow, 41 Md., 59, *decided in 1874*, the clause of the contract under consideration was "Loss, if any, payable pro rata to them at same time and in same manner as they pay."

The court held that the insolvency of the original insurer in no wise affected or limited the liability of the reinsuring company.

In *Ex parte* Norwood, 3 Bissell, 512, *decided in 1873*, the

words of the contract were "loss, if any, payable at the same time and pro rata with the insured," and it was held that payment by the reinsured was not essential to recovery from the reinsured.

To the same effect is the case of Cashau *vs.* N. W. Nat'l Ins. Co., 5 Bissell, 476, *decided in 1873.*

In The Fame's Ins. Company's Appeal, 83 Pa. St., 396, *decided in 1877,* the words "the losses, if any, are to be payable pro rata to the Enterprise Insurance Company at such time and in such manner as the latter company may pay." It was held that insolvency of the reinsured company did not relieve the reinsuring company from liability to pay.

The foregoing are all of the cases cited by the Court of Appeals in support of its opinion in this case.

It will be observed that all of these cases were decided long before the making of the contract of reinsurance sued upon in this action. This statement, we believe, is equally true with respect to the cases referred to in the brief filed herein in behalf of the Reinsured. It is fair to assume, therefore, that the framer of this contract had in mind the construction theretofore given by the courts to such contracts, and for that reason employed the language found in sections 10 and 11 of the contract for the express purpose of making it appear that the Reinsuring Company was not to be held liable to pay any money to the Reinsured until after the Reinsured had actually paid the losses upon risks covered by the contract.

It will be further observed that none of the contracts construed in the cases cited contain the provisions found in sections 10 and 11 of the contract in controversy here, which provisions, we submit, are absolutely controlling in this case.

We again quote their language:

> "11. * * * losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as *paid* by the said reinsured company under its contracts hereunder reinsured, and in *no event* shall this company be liable for an

> amount in excess of a ratable proportion of the sum *actually paid* to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured," etc.

In considering this language regard must also be had to the language of section 10 of the contract, which, after providing what proofs shall be furnished the Reinsuring Company by the Reinsured in case of loss under any risk covered by the contract of reinsurance, provides that these proofs shall be forwarded to the Reinsuring Company at Pittsburg, Pennsylvania, *"together with * * * a copy of the original receipt taken upon the payment of such loss."*

There is nothing unreasonable in the Reinsuring Company providing in its contract of reinsurance that payment of losses on risks covered by it shall be made by the Reinsured before it can demand payment under the contract of reinsurance. Nor does it contravene any rule of public policy. The contract of reinsurance is not made for the benefit of the policy-holders under the Reinsured Company. There is no privity of contract between such policy-holders and the Reinsuring Company. The contract in this case was made for the *protection* of the Reinsured, and we submit that the language of it clearly demonstrates that it was intended, not as protection against mere *liability to pay*, but against *actual payment* of losses.

This court has held that—

> "Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.
>
> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in

case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms. * * * The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery."

Imperial Fire Ins. Co. *vs.* Coos Co., 151 U. S., 462-463.

"The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as *the words they saw fit to employ,* when properly construed, and the rules of law will permit. In other words, *courts cannot adopt a construction* of any legal instrument *which shall do violence to the rules of language,* or to the rules of law. *Words must not be forced away from their proper signification to one entirely different,* although it might be obvious that the words used, either through ignorance or inadvertence, expressed a very different meaning from that intended."

Parsons on Contracts, 7th ed., vol. 2, p. 626.

"The question may be whether the words used should be taken in a comprehensive or a restricted sense; in a general or a particular sense; in the popular and common, or in some unusual and peculiar sense. In all these cases the court will endeavor to give to the contract a rational and just construction; but the presumption * * * is in favor of the *comprehensive* over the restricted, the *general* over the particular, the *common* over the unusual sense."

Parsons on Contracts, 7th ed., vol. 2, p. 632.

"* * * if the words employed were those intended to be used, but their meaning was totally different from that which the parties supposed and

> intended them to bear, still *this actual meaning would,* generally, if not always, *be held to be their legal meaning.*"
>
> Parsons on Contracts, 7th ed., vol. 2, p. 628.

It is respectfully submitted that the language of paragraph 11 of this contract is neither technical nor ambiguous, nor have any of the terms used therein "acquired a meaning distinct from the popular sense of the same terms." They must therefore be "taken and understood in their plain, ordinary, and popular sense."

What is the "plain, ordinary, and popular sense" of the words *"and in no event"?*

The word "event" is defined by Webster to be—

> "That which comes, arrives, or happens; that which falls out; any incident, good or bad."
> "Syn.: occurrence, incident, circumstance."

It would be as futile to deny that insolvency is an "event" as to deny that it "came," "arrived," or "happened" in the case of the appellee. The words "in no event" include and refer to *insolvency* as clearly as though that word were visibly written into the contract. Any other construction would "do violence to the rules of language" by forcing those words "away from their proper signification to one entirely different."

In the case of Blackstone *vs.* Alemannia (*supra*) the court held that the *pro rata* clause of the contract limited the liability of the reinsurer to "such a proportion of the *amount of the loss* as is in the ratio of the amount of the reinsurance to the amount originally insured."

In the case at bar the contract provides "in no event shall this company be liable for an amount in excess of a *ratable proportion of the sum actually paid*" * * * —not a ratable proportion of the *loss.*

What is the meaning of the words "actually paid"?

The following definitions are given by Webster:

"Actual:

"1. Existing in act, and truly and absolutely so; * * * Carried out; opposed to *potential, possible,* or *theoretical.*

"2. Existing at the present time."

"Actually:

"In act or in fact; really; in truth; positively."

The case of Kelly *vs.* Supreme Council, &c., 46 App. Div., 79, N. Y., was an action upon a policy of life insurance predicated upon a presumption of death of the insured because of his absence for a certain period of time. The defendant company set up in its answer by way of defense that by the terms of the policy proof of *actual death* was necessary to entitle the beneficiary to recover.

The court in its opinion say (p. 82):

> "Plaintiff's husband and the defendant had a legal right to agree as to the proof which should be furnished concerning his death before a liability to pay should arise. The presumption that death has occurred after a continued absence unheard from, for a period of seven years, is a rule of evidence. This presumption the parties have a right to agree shall not apply, and that such absence shall not be evidence of death. *The word 'actual' used in the certificate has a definite and well understood meaning. It is something real, in opposition to constructive or speculative, something existing in fact. By its use the defendant manifestly intended to and did provide against liability in case of a speculative or presumptive death. In other words, it sought to provide against liability in just such a case as this. The parties, as we have seen, had a legal right to enter into an agreement of this character, and it cannot be said to be 'illegal, unreasonable, inconsistent with the objects and purposes of the corporation, or repugnant to the law, to public policy or to good morals.'*"

"Pay:

"1. To satisfy, as another person, for service ren-

dered, property delivered or the like; to discharge one's obligations to; * * * To compensate.

"3. To discharge, as a debt or obligation, by giving or doing that which is due; * * * to deliver the amount or value of to the person to whom it is owing; to fulfill or perform as what is promised; to render duly."

The meaning of the words "actually paid" is so clear it is difficult, if not impossible, to suggest a synonymous phrase which will not tend to obscure rather than to clarify that meaning. It is impossible to construe them to mean "may become liable to pay" without absolutely disregarding all definitions and rules of construction. A promissory note is not "actually paid" by an endorser by the mere fixing of his liability; a debt is not "actually paid" by the mere entry of a judgment against the debtor.

The liability of the reinsuring company being clearly and expressly fixed by the terms of the contract, the court will not enlarge it.

Kerr on Ins., pp. 729-735.
Imperial Ins. Co. *vs.* Coos County (*supra*).

The moment the reinsured accepted the contract in this case it assumed and took upon itself the duty of performing a certain definite act by which, and by which alone, the extent and measure of the liability of the reinsuring company could be ascertained in the event of a loss. The reinsured, by its acceptance of this contract, agreed that "actual payment" by it of its losses should be a condition precedent to its right of recovery against the Reinsuring Company.

"The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions in which the contract is

made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate.

"If the words used in a contract are by the party who is to do the act, they plainly import that he binds himself to do so; while if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done—that is, his own obligation should be contingent upon its being done. * * * Any clause therefore in a policy of insurance requiring anything to be done by the insured will be a condition of the covenant or promise of insurance."

Langdell on Contracts, sec. 33.
Ostrander on Insurance, sec. 334.

"The reinsurer is entitled to insist upon the strict compliance by the reinsured with all the conditions, stipulations and requirements of the contract of the reinsurance, just as the reinsured is entitled to a full compliance by the original insured with the terms and conditions of the primitive contract."

Kerr on Insurance, p. 740.

"When it appears from the language employed that it is the intention of the parties that payment of a loss will depend on the performance of any particular thing by the insured, and when such stipulations and requirements are made a part of the consideration for the promise or engagement of the insurer, there can be no recovery under the policy unless the insured showed such performance."

Braunstein *vs.* Ins. Co., 1 Best and S., 728.

The declaration in this case contains the following allegation in regard to the non-payment of its losses:

"And the plaintiff further avers that by reason of the heavy losses sustained by it in the great conflagration in the city of Baltimore, State of Maryland, in the month of February, 1904, under its outstanding

> policies, and for which said losses it is liable, it became insolvent and unable to pay said losses and will be unable to pay the same unless it can collect the amount due it by the defendant as aforesaid and other corporate fire insurance companies with which it had contracts of reinsurance;" * * * (Rec., p. 6).

The reinsuring company demurred to the declaration upon the ground that it did not show a sufficient performance by the reinsured of the contract sued upon to entitle it to maintain this action (Rec., p. 8).

This demurrer the reinsuring company now insists upon by virtue of section 1533 of the Code, which is as follows:

> "*Waiver of Demurrer.*—In all cases, civil or criminal, in which any or either party shall demur to any indictment, declaration, or other pleading of the adverse party, and said demurrer shall be overruled, the party demurring shall have the right to plead over, by traverse or otherwise, without waiving his said demurrer; and upon appeal shall have the right to insist upon his demurrer and have the benefit of it as fully as if he had not pleaded over."

> "If the plaintiff's right of action depends upon a condition precedent, he must allege and prove the fulfillment of the condition or a legal excuse for its non-fulfillment. And if he omits such allegation his declaration will be bad on demurrer."
> Cyc., vol. 9, p. 699.

Actual payment by the Reinsured being a condition precedent to its right of recovery against the Reinsuring Company, is insolvency a legal excuse for the non-fulfillment of that condition?

The performance of this condition was possible at the time of the execution of the contract.

The insolvency of the Reinsured was an event the happening of which could have been provided against by the terms of the contract. There being no such provision in the contract, it must be conclusively presumed that the parties had

that event, as well as all others, in mind when they agreed that "in no event" should the Reinsuring Company be liable for an amount in excess of ratable proportion of the sum actually paid, &c.

The fact that performance of this condition precedent is now impossible does not invalidate it, nor is the Reinsured relieved or discharged from its obligation.

> "A contract is not invalid, nor is the promissor discharged merely because it turns out to be difficult, unreasonable, dangerous or burdensome."
>
> Cyc., vol. 9, p. 625.

> "When the performance becomes impossible subsequent to the making of the contract the general rule is that the promissor is not therefore discharged. * * * 'when the party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity because he might have provided against it by his contract.'"
>
> Cyc., vol. 9, pp. 627-628, and cases cited in notes.

The Court of Appeals in its opinion, referring to the provisions of section 11 of the contract in controversy, says (R., p. 22):

> "In our opinion the additional clause in the eleventh stipulation of the contract of reinsurance before us was not intended to mean that the insolvency of the first insurer should release the reinsurer. The word 'paid' in the clause 'losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as *paid* by the said reinsured company' means 'payable' or 'liability to pay.' The concluding words, 'and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum *actually paid* to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured after deducting therefrom any and all liability of other reinsurers of said

contracts, or any part thereof,' does not vary the meaning so as to operate to release from liability the reinsuring company because the first insurer became insolvent. The added words were not intended to change and do not change the import of this contract of indemnity. They mean that the liability of the reinsurer is to be coextensive with the liability of the reinsured company and are intended to protect the reinsuring company from paying more than the 'sum actually payable' by the reinsured company. The words 'sum actually paid' in this collocation providing for deducting therefrom 'all liability of other insurers' must mean that in no event shall the reinsuring company pay more than a ratable proportion of the sum 'actually payable' by the reinsured company, or, in other words, more than its ratable proportion of the actual liability to pay 'on the part of the reinsured after deducting all liability of other reinsurers.' "

This holding, we submit, is in the very teeth of the language of the contract, and contrary to the rules of construction applicable to contracts hereinbefore referred to.

If the words *"paid"* and *"actually paid,"* as used in the eleventh section of the contract, were intended to mean *"payable," "liability to pay,"* or *"sum actually payable,"* what is to become of the provision of section 10 of the contract requiring the reinsured to submit with its proof of loss and claim against the Reinsuring Company *"a copy of the original receipt taken upon the payment of such loss"?*

If any doubt should exist as to the meaning of the words *"paid" and "actually paid"* as used in section 11, we submit it is entirely and absolutely removed by the above-quoted provision of section 10.

In conclusion, we call the attention of the court to the fact that this suit is brought to the use of the receiver of the Reinsured Company. It is fair to assume that all moneys received by him will be distributed pro rata among all of the creditors of the Reinsured, whether they be policy-holders or not. So that if a recovery be had in this case against the

Reinsuring Company the anomalous situation will exist of its being compelled to pay to persons whom it never obligated itself to pay in any event.

For the reasons stated it is respectfully submitted that the court below erred in its several holdings, and that its judgment should therefore be reversed.

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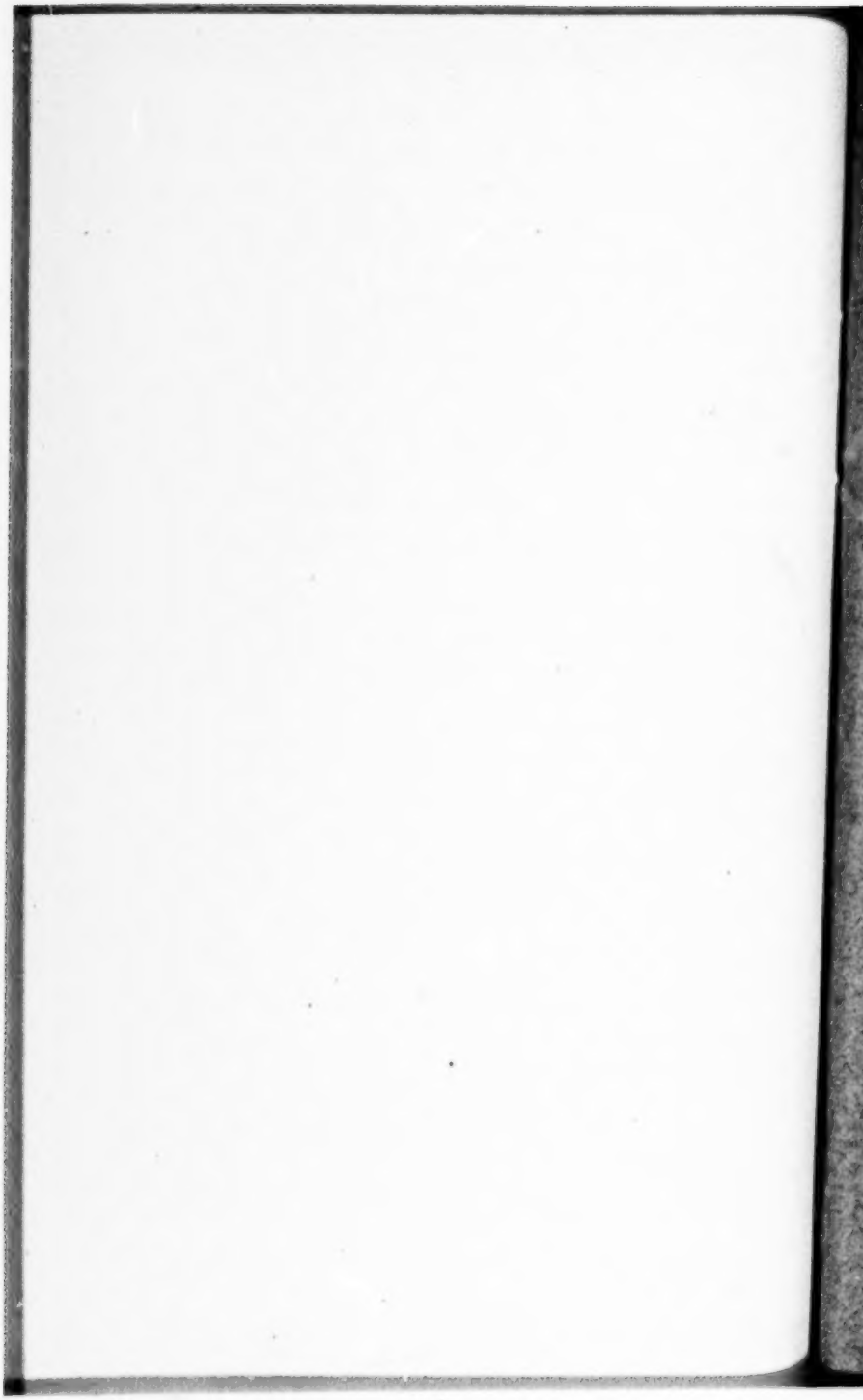

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 180.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PA., PLAINTIFF IN ERROR,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, MD.

BRIEF FOR DEFENDANT IN ERROR.

WM. K. MATTINGLY,
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Attorneys for Defendant in Error.

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vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, MD.

Statement.

The action below was brought by the defendant in error against the plaintiff in error upon a contract of reinsurance by the plaintiff in error of property insured by the plaintiff below which was destroyed by the conflagration in Baltimore in February, 1904.

The amount of losses on the property reinsured was claimed to be $56,312.56, and the amount for which defendant was liable under its contract of reinsurance was claimed to be $22,613.24.

The declaration was demurred to on the ground that under the 11th stipulation of the contract of reinsurance the defendant was only liable for its *pro rata* of the amount actually paid by the plaintiff to the assured; and that, as the declaration averred that the plaintiff, by reason of said conflagration, had become insolvent and been placed in the hands of a receiver and was and will

be unable to pay its losses unless it can collect the amounts due by the defendant and other fire insurance companies with which it had contracts of reinsurance, plaintiff was not entitled to recover anything, not having actually paid anything.

The demurrer was overruled by the court and its opinion appears on pages 9 to 12 of the record.

This paragraph eleven of the contract is as follows:

> "11. Each entry under this contract, unless otherwise provided in this contract, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, *and losses, if any, shall be payable pro rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company, under its contracts hereunder reinsured, and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company* under its original contracts hereunder reinsured, after *deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof.*"

On the trial of the case it was conceded that under the evidence the plaintiff was entitled to a verdict for $12,613.24 with interest from May 4, 1904 (Rec., p. 15), unless it was relieved from liability under said section 11; and verdict and judgment for said amount were rendered accordingly. This judgment was affirmed by the Court of Appeals (Rec., pp. 18–23).

ARGUMENT.

The only point in the case is, whether the plaintiff company, having become insolvent and unable to pay its losses, the defendant company, under section 11 of its contract of reinsurance, was thereby relieved from liability under its contract.

The contract did not contemplate insolvency. It was a contract of indemnity and the legal construction of section 11, in connection with the entire contract, following the strict intent of both parties to it, is that in no event should the defendant be required to pay under its contract more than its ratable proportion of the actual liability of the plaintiff.

The authorities are uniform in giving this construction to these reinsurance contracts.

May on Ins., sec. 11–11a.
2 Clement on Fire Ins., 551–557.

Consolidated R. E. & F. Ins. Co. *vs.* Cashow, 41 Md., 59, 74, 75:

In this case the policy of reinsurance provided: "Loss if any, payable pro rata to *them at same time and in same manner as they pay.*" The original insuring company had become insolvent. The court, in its opinion (p. 74), states:

> "But from the nature of the contract of reinsurance the insolvency of the original insurer in no wise affects or limits responsibility under it. There is no privity of contract between the original assured and the reinsurer. The contract of reinsurance is totally distinct from, and unconnected

with the original insurance; the original assured has no kind of claim against the reinsurer; the reassured remains solely liable on the original insurance, and alone has any claim against the reinsurer. Hence, if the original insurer becomes bankrupt and the assured be paid but a small dividend out of his estate, the reinsurer is still liable to pay the whole amount of the reinsurance to the trustee of the original insurer without deducting the dividend, and the original assured has no claim in respect of the money so paid. This view of the nature and character of this contract was early adopted by the maritime nations of continental Europe, where it originated, and has been recognized and followed by all the treaties and decisions on the subject since."

Blackstone, Receiver, *vs.* Allemannia Ins. Co., 56 N. Y., 104, is to the same effect.

In re Insurance Co.s' Appeal, 83 Pa., 396:

The contract of reinsurance provided that—

"'the losses, if any, are to be payable pro rata to the Enterprise Insurance Company *at such time and in such manner as the latter company may pay.*' This clause must have such an interpretation as will not entirely defeat the contract. It can evidently have no application where, as in this case, the Enterprise Company have made a general assignment for the benefit of their creditors. If the assignee can only recover from the defendants when and as he pays dividends on the assigned estate to the original insured, it is plain an endless number of suits must be the consequence; and if it had so happened that there was no assigned estate, there could be no recovery at all. I would construe the words, *'as the latter company may pay,'* to mean, *'as the latter company may be liable to pay.'* It meant that the Fame Company should have all the advantages of the

Enterprise Company as to the times and manner of payment; that they should not be called on to pay on the immediate happening of the loss, but whatever conditions as to the time and manner of payment might be annexed to the original policy should be extended to them."

Cashau *vs.* Northwestern Nat. Ins. Co., 5 Fed. Cas., No. 2,499:

"The condition in that policy, that 'in case of loss the company shall pay pro rata at and in the same time and manner as the reinsured,' can not mean that in case of the insolvency of the Fulton Company the defendant shall only be obliged to pay the pro rata of the dividends of the assets of said company upon the claim of the first insured. It can not have such application. The condition means that the defendant shall pay at and in the same time and manner as the reinsured company shall pay or be bound to pay according to its policy, and that the defendant shall have all the advantages of the time and manner of payment specified in the policy of the Fulton Company, otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue."

Ex parte Norwood, 18 Fed. Cas., No. 10364.

A provision of the reinsuring policy was, "Loss, if any, payable at the same time and pro rata with the insured." The court in its opinion (p. 457) states:

"For the original company may have reinsured for the purpose for which reinsurance is usually if not universally accomplished—for the purpose of supplying itself with a fund with which to meet its obligations. It may have placed its own funds entirely out of its control; it may have divided its capital among its stockholders, and may depend solely upon the reinsurance to make good its liability to policyholders.

"The intention of this clause was to make the reinsuring company's liability coextensive, and only coextensive with the liability of the original insurance company. For instance, suppose an insurance company in the city of Chicago wishes to go out of business. It has money enough to reinsure all its risks, and does so, and goes out of the insurance business. That company does not keep a fund on hand any longer for the purpose of meeting losses as they fall in, but depends upon its reinsurance.

"Now, it is to my mind absurd to say, if a loss occurs on one of those reinsured policies, that the company primarily liable is to have its claim against the reinsuring company limited by its ability to meet its obligations to its original policyholders. The very object of making the policy of reinsurance was to place the company in funds with which to make its policyholders whole, and that is defeated if the construction which is insisted upon by the assignee in this case is the true one.

"The fair, liberal construction, it seems to me, of this clause, and the salutary one, is to assume that the true intent of it, the judicial meaning, is that the liability of the reinsuring company is to be no greater than that of the original company; that they are not to be compelled to pay any faster than the original company would be compelled to pay, that they are to have the benefit of any defense which the original company would have had. Any deduction—any equity—which the original company would have had against the original insured, is to inure to the benefit of the reinsuring company."

In re Republic Ins. Co., 20 Fed. Cas., No. 11705 is to the same effect as Ex parte Norwood, *supra.*

The construction of these reinsuring contracts, as shown by authorities cited, is in conformity with the

general principles, relating not only to indemnity contracts, but all contracts. The fundamental rule of construction is that the consideration of the situation of the parties when the contract was made, its subject-matter and the purpose of its execution, are material to determine the intention of the parties and the meaning of the terms they used, and that when these are ascertained they must prevail over the words of the stipulations.

> Kauffman *vs.* Raeder, 54 L. R. A., 247, 250, S. C., 47, C. C. A., 278.

Canal Co. *vs.* Hill, 18 Wall., 94:

> "To ascertain the intent of the parties is the fundamental rule in the construction of agreements. When the substantial thing which they have in view can be gathered from the whole instrument, it will control mere formal provisions, which are intended only as a means of attaining the substance.
>
> "The state of things and surrounding circumstances in which an agreement is made will be looked at as a means of throwing light upon its meaning, especially for the purpose of ascertaining what is its true subject-matter."

In this case Hill leased from the canal company so much water as would pass through an aperture of two hundred square inches. *Held*, that it was a contract to take so much water in bulk or weight, and to get that quantity of water he would have the right to enlarge the aperture.

O'Brien *vs.* Miller, 168 U. S., 287:

Words in a bottomry bond "said vessel," in the singular, construed, having in view the evident intention of the parties, "said vessels."

In its opinion the court refers with approval, page 301, to the case of the Insurance Company *vs.* Duval, 8 S. & R., 147, in which a loan had been made upon goods in a vessel, which was to be repaid within a certain time *after the return of the vessel* to Philadelphia. The vessel was condemned and sold at an intermediate port and the goods were sent to Philadelphia in other vessels. The defendants claimed that the terms of the bond did not make the repayment of the loan dependent upon the return of the goods, but upon the return of the vessel, and that as the vessel did not return the day of payment had not arrived; but the court held that even if under a literal interpretation the right to recover did not exist, a resort to the spirit of the contract and the intention of the parties would entitle the lender to judgment, as the goods and not the vessel were the sources from which the defendants expected to derive the means of payment.

Illinois Ins. Co. *vs.* Andes Ins. Co., 67 Ill., 362.
Eagle Ins. Co. *vs.* Lafayette Ins. Co., 9 Ind., 443.
Gantt *vs.* American Ins. Co., 68 Mo., 503.
24 A. & E. Enc. (2d ed.), 265 f, 267 (2), 270, VIII.

It is respectfully submitted that the judgment below should be affirmed.

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